

FINDING OF EMERGENCY

The Secretary of the Department of Food and Agriculture finds that an emergency exists. This regulation is being amended as an emergency regulation necessary for the immediate preservation of the general welfare, within the meaning of Government Code Section 11346.1.

Description of Specific Facts Which Constitute the Emergency:

The Department of Food and Agriculture has found that oak mortality disease (sudden oak death) caused by a fungus, *Phytophthora ramorum*, presents a clear and present danger to the native stands of oak and other trees, the nursery industry, other agricultural commodities and plant life (including ornamental plantings) of California. Section 3700 implements a program to arrest the artificial spread of the disease. Continued action is necessary to contain and minimize the destructive impact of this pest and disease at the earliest possible time. On April 9, 2004, the Administrator of the United States Department of Agriculture (USDA), Animal and Plant Health Inspection Services (APHIS) issued the first emergency order restricting the interstate movement of nursery stock from California nurseries located outside the area regulated under Section 3700.

On April 22, 2004, USDA, APHIS issued a new order that replaced that issued on April 9, 2004. On April 23, 2004, USDA, APHIS issued a clarification of its April 22, 2004 order. Through this last federal emergency order and its subsequent clarification, the USDA, APHIS identified additional plant species as regulated associated articles and as such, these associated articles are prohibited interstate movement from all California nurseries unless properly certified under the provision of the federal emergency order.

Since April 2004, the USDA, APHIS has issued a series of federal emergency orders that amended the articles regulated including on: 1) August 5, 2004, 2) December 21, 2004, 3) August 3, 2005, 4) September 14, 2005, 5) November 15, 2005 (effective November 28, 2005), 6) February 10, 2006 (effective February 20, 2006), 7) March 14, 2006 (effective March 31, 2006) 8) July 17, 2006 (effective August 1, 2006) and 9) September 21, 2006 (effective October 10, 2006). As a result, it was necessary to make emergency amendments to the State's regulation governing the intrastate movement of hosts and associated articles (nursery stock) to be consistent with these federal orders. Without a parallel State regulation

that is substantially the same as the federal domestic quarantine and related federal orders, the USDA cannot regulate less than the entire State.

On February 27, 2007, the USDA published a new federal interim rule, Federal Register, Volume 72, Number 38, Docket Number 01-054-3, which became effective upon publication. The USDA deemed this action necessary to incorporate the requirements of its series of federal emergency orders into its regulation and to again amend its host list with additional plant taxa that can be infected by *P. ramorum*. Additionally, the USDA is again amending both its “hosts” and “associated hosts” lists in order to control the artificial spread of this disease.

This federal interim rule specifically affects the interstate movement of nursery stock from several states, including California. Under authority of this federal interim rule, nurseries operating under a compliance agreement may continue to ship “Hosts and Associated Plants” including these newly listed plants. Any nurseries containing these newly listed associated plants must be properly inspected, sampled and tested and placed under a Compliance Agreement to be able to move plants interstate.

Among other changes, the February 27, 2007 federal interim rule changes the regulatory status of two plant genera and adds four new plant species to its revised “APHIS List of Hosts and Plants Associated with *Phytophthora ramorum* (Revision dated February 27, 2007).” This includes regulating the entire genera of *Kalmia* and *Pieris* (including all species, hybrids and cultivars) as hosts. Section 3700 currently regulates some species of *Kalmia* and *Pieris* but not the entire genera. Therefore, to ensure harmonization with the federal interim rule, these plant genera are being added under Section 3700(c) as hosts and specific references to the plant species of these two genera are being deleted from Section 3700(c).

This federal interim rule adds four new plant species: *Arctostaphylos uva-ursi* (Kinnikinnick), *Osmanthus delavayi* (Delavay Osmanthus), *Prunus laurocerasus* (English laurel) and *Schima wallichii* (Chinese guger tree) to its “Plants Associated with *Phytophthora ramorum*” list. Therefore, to ensure harmonization with the federal interim rule, these plants are also being added to Section 3700(c) as “associated articles.”

Additionally, the federal interim rule specifies: *Acer pseudoplatanus* (planetree maple), *Aesculus hippocastanum* (horse chestnut), *Fagus sylvatica* (European beech), *Fraxinus excelsior* (European ash), *Lithocarpus densiflorus* (tanoak), *Quercus agrifolia* (coast live oak), *Quercus cerris* (European turkey oak), *Quercus chrysolepis* (canyon live oak), *Quercus kelloggii* (California black oak) and *Quercus parvula* var. *shrevei* and all nursery grown *Q. parvula* (Shreve's oak); as additional bole hosts. Therefore, to ensure harmonization with the federal interim rule, these plants are also being added to Section 3700(c) as bole (bark and wood) hosts.

Finally, in order to ensure clarity and to simplify Section 3700(c), it is being reorganized to reflect the host and associated host lists as they appear in the federal interim rule.

As this federal interim rule became effective on February 27, 2007, the Department is proposing these emergency amendments to Section 3700(c) to continue to provide the necessary regulatory framework for a State program to continue to arrest the intrastate and interstate spread of this disease and be in compliance with the February 27, 2007 federal interim rule.

The Department proposes to amend this regulation because it is necessary to continue to have authority for an established statewide program in order to arrest the artificial spread of the disease to additional areas and harmonize the State's regulation governing the intrastate movement of nursery stock with the latest federal order that governs the interstate movement of California nursery stock. Immediate amendment of this regulation is necessary to mitigate the effects of this disease on the agricultural industry, which includes native tree stands. Additionally, it is necessary to immediately amend this regulation to avoid more stringent federal restrictions being placed against the State to prevent the interstate movement of articles and commodities that may carry *Phytophthora ramorum*. Without the immediate implementation of this proposed regulatory action, the USDA, APHIS may consider the entire state as infested with *Phytophthora ramorum*, rather than just the current 14 regulated counties. If this were to occur, there would likely be additional detrimental quarantine requirements directed against California commodities by our international trade partners.

These facts and circumstances clearly indicate that the spread of oak mortality disease presents a clear and imminent danger to property and, therefore, constitutes an emergency. The Department is therefore compelled to take immediate action to mitigate the damage to property and preserve the general welfare.

The Department has determined that *Phytophthora ramorum* is a serious forest pest for which control is required to prevent further spread and harm to forests, parks, commercial and urban landscapes, and watersheds. This disease is known to occur in 14 California counties. Oak mortality disease is serious due to the fact that it kills tanoak, coast live oak, and black oak trees. The pest has been confirmed as infecting Shreve's oak and non-oak species such as rhododendron, huckleberry, bigleaf maple, California buckeye, California coffeeberry, manzanita, and toyon and other hosts causing foliar and stem disease symptoms.

Phytophthora ramorum has the capability of causing significant irreparable harm to California's forest industry and environment. While the Department's compliance with the Administrative Procedure Act and the California Environmental Quality Act (CEQA) are separate actions, they can be interrelated. Although the amendment of specific regulatory authority can be the beginning of a project and therefore covered by CEQA, this is a ministerial action for an emergency and an action also for the protection of natural resources and the environment by a regulatory agency and is therefore exempt from the requirements of the CEQA statutes, under PRC Section 21080, and under Sections 15268, 15269, 15307 and 15308 of the CEQA Guidelines.

The proposed emergency amendments of Section 3700(c) will establish new hosts and associated articles that are regulated. To protect California's agricultural industry, it is necessary to immediately regulate movement of hosts and potential carriers that may transfer the pest from the infested area. Therefore, it is necessary to amend Section 3700(c) on an emergency basis. Additionally, the agency is not aware of any entity or person who has requested a notice of regulatory action and that must be provided a five working days advance notice by sending them the finding of emergency and the proposed text of the regulation.

Authority and Reference Citations

Authority: Sections 407, 5321 and 5322, Food and Agricultural Code.

Reference: Sections 24.5, 5321 and 5322, Food and Agricultural Code.

Informative Digest

Existing law obligates the Department of Food and Agriculture to protect the agricultural industry in California and prevent the spread of injurious pests (Food and Agricultural Code, Sections 401 and 403). Existing law also provides that the Secretary may establish, maintain, and enforce such regulations as he deems necessary to prevent the spread of pests to protect California's agricultural industry (Food and Agricultural Code, Section 5322).

Section 3700. Oak Mortality Disease Control.

The proposed emergency amendment of Section 3700(c) will establish all species, hybrids and cultivars of both the genera of *Kalmia* and *Pieris* as hosts under the articles and commodities covered by the regulation.

The proposed emergency amendment of Section(c) will establish *Acer pseudoplatanus* (planetree maple), *Aesculus hippocastanum* (horse chestnut), *Fagus sylvatica* (European beech), *Fraxinus excelsior* (European ash), *Lithocarpus densiflorus* (tanoak), *Quercus agrifolia* (coast live oak), *Quercus cerris* (European turkey oak), *Quercus chrysolepis* (canyon live oak), *Quercus kelloggii* (California black oak) and *Quercus parvula* var. *shrevei* and all nursery grown *Q. parvula* (Shreve's oak); as additional bole hosts under the articles and commodities covered by the regulation.

The proposed emergency amendment of Section 3700(c) will also establish *Arctostaphylos uva-ursi* (Kinnikinnick), *Osmanthus delavayi* (Delavay Osmanthus), *Prunus laurocerasus* (English laurel) and *Schima wallichii* (Chinese guger tree) as associated articles under the articles and commodities covered by the regulation.

The proposed emergency amendment of Section 3700(c) will also delete the existing subsections: 3700(c)(2), 3700(c)(3), 3700(c)(4), 3700(c)(5), 3700(c)(6), 3700(c)(7), 3700(c)(8),

3700(c)(9) and 3700(c)(10); and incorporate the plants listed under these subsections into the existing subsection 3700(c)(1).

The effect of the changes to the regulation is to provide authority for the State to regulate movement of these new hosts, “associated hosts” and bole hosts and potential carriers of disease from the regulated area to prevent artificial spread of the pest to non-infested areas to protect California’s agricultural industry and the environment.

Mandate on Local Agencies or School Districts

The Department of Food and Agriculture has determined that Section 3700 does not impose a mandate on local agencies or school districts, except that the agricultural commissioner of a county under regulation has a duty to enforce it. No reimbursement is required under Section 17561 of the Government Code because the 14 affected agricultural commissioners requested that they be added to the regulation.

Cost Estimate

The Department has also determined that no savings or increased costs to any state agency, no reimbursable costs or savings under Part 7 (commencing with Section 17500) of Division 4 of the Government Code to local agencies or school districts, no nondiscretionary costs or savings to local agencies or school districts, and no costs or savings in federal funding to the State will result from the proposed action.